

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

&

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

MONDAY, THE 9TH APRIL 2007 / 19TH CHAITHRA 1929

Ex.FA.No. 41 of 2006()

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AGAINST THE ORDER DATED 18/10/2006 IN EA.637/03IN EA.302/02  
IN EP.5/97 IN OS.391/1984 of II ADDL.SUB COURT, THRISSUR

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APPELLANT/PETITIONER

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K.HEMACHANDRAN, 'MEKHANA',  
VEEYLOOR P.O., THRISSUR.

BY ADV. SRI.K.P.SREEKUMAR  
SRI.R.GIREESH VARMA  
SRI.P.M.SATHEESH

RESPONDENTS: RESPONDENTS

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1. C.J.JOY, S/O.OOKKEN JOSEPH,  
PERINGAVU DESOM, CHEMBOOKAVU VILLAGE,  
THRISSUR DISTRICT.
2. STATE BANK OF INDIA, KUMARA PARK  
BRANCH, BANGALORE.

R2 BY ADV. SRI.K.JAYAKUMAR  
SRI.P.B.KRISHNAN  
SRI.T.C.MOHANDAS  
SRI.T.M.SUNIL  
SMT.S.CHITHRA

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD  
ON 19/03/2007, THE COURT ON 09/04/2007 DELIVERED THE  
FOLLOWING:

ORDER ON I.A.NO.2163/2006 IN EX.F.A.NO.41/2006

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DISMISSED.

Sd/- P.R.RAMAN, JUDGE.

9/4/2007

Sd/- ANTONY DOMINIC, JUDGE.

**P.R.RAMAN & ANTONY DOMINIC, JJ.**

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**EX.F.A.NO.41 OF 2006**  
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**Dated this the 9th day of April, 2007**

**JUDGMENT**

**Raman, J.**

The appellant herein is the applicant in E.A.No.637/2003 in E.A.No.302/2002 in E.P.No.5/1997 in O.S.No.391/1984 on the file of the Subordinate Judge's Court, Thrissur. The application was filed by him under Order XXI Rule 58 of the Code of Civil Procedure claiming independent right over the properties, which was sold in public auction in court sale and purchased by the 1st respondent herein as the auction purchaser. Second respondent herein namely, the State Bank of India, was the decree holder in O.S.No.391/84. That was a mortgaged suit instituted by the Bank and the judgment debtor, defendant in the suit, was none other than the appellant's mother, Chandrika N. Menon. The suit was eventually decreed in favour of the Bank in spite of contest by Chandrika N. Menon. For execution of the said decree E.P.No.5/97 was filed. It was in the said proceedings that the properties of an extent of 6 cents and a building comprised in Sy.No.145/15 of Thrissur Village was sold in public auction, after overruling the objection raised by the judgment debtor. The 1st respondent herein bid the property in

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the court auction conducted on 26/7/1999 for an amount of Rs.7,00,000/-.

As a matter of fact, the mother of the appellant herein filed an application No.1137/99 under order XXI Rule 90 of the Code of Civil Procedure seeking to set aside the sale, which was dismissed on 10/3/2000 against which she preferred a revision petition as C.R.P.No.1438/2000 before this Court. That revision was also dismissed by order dated 8/10/2001. The sale proceeds were thereafter deposited and sale certificate was also issued in favour of the 1st respondent. Thereafter, an application No.302/2002 was filed for effecting delivery of the property. During the pendency of the application the mother of the appellant died and her legal representatives were impleaded as additional respondents in the delivery application. The appellant herein was the 4th petitioner in the delivery application. After entering appearance, he filed the present application not only as one of the legal heirs of the deceased Chandrika N. Menon but also claiming independent right over the properties in question. It was also contended that a suit for partition was filed between the mother of the appellant and other heirs of Chandrika N. Menon as O.S.No.170/85 and a preliminary decree was passed on 14/8/1987. In terms of the preliminary decree a partition deed was registered between the parties and

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the property in question thus allotted to the share of the appellant and hence he has got absolute right over the property. It was the further contention of the appellant that the petition schedule properties are in the joint possession and ownership of the appellant and respondents 3, 5 and 6 and that the said properties are thavazhi properties and are not liable to be put for sale for realising the debt of the 1st respondent in the delivery application. According to him, the appellant was abroad in connection with his employment in the year 2000, that he was not able to file any application contesting the matter earlier, that the petition schedule properties were not in exclusive possession of Chandrika N.Menon, that she had no income or means to purchase the petition schedule property and the property was purchased by her with the sale proceeds of the thavazhi property and that she had constructed a building in the schedule property with the funds of her husband, Parakkotte Narayanan Menon and also with the funds of the appellant/petitioner. As such Chandrika N. Menon has no absolute right over the property. The application was contested by the auction purchaser (1st respondent herein) denying the allegations and further contended that Chandrika N.Menon herself had filed an application earlier to set aside the sale, which was eventually

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dismissed by the execution court and confirmed in revision by this Court in C.R.P.No.1438/2000. It was thereafter that an application for delivery was filed by the auction purchaser and that the petitioner has come up with this application raising untenable contentions. In this connection it was also pointed that the appellant's mother had no contention that the property belongs to other respondents also, that she mortgaged the property to the Bank as against the loan advanced by the Bank and the suit instituted by the Bank for realisation of the loan amount has been decreed and has become final, which facts are known to the appellant/petitioner. The 3rd respondent in the delivery application was also a party to the Execution Petition No.5/1997 wherein he had no such contention that the property was in joint possession and ownership of other respondents. It was also contended that the appellant/petitioner was looking after the revision petition filed by his mother before this Court and he was also aware of the delivery application and also the execution petition. The appellant along with his mother and other brothers colluded together and thereafter they filed a suit for partition before the Munsiff's Court as O.S.No.170/85 with a view to defeat the rights of the Bank without impleading the Bank as a party in the suit. The document so executed by

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the appellant/petitioner, his mother and brothers as per the settlement deed No.1831/88 of the Sub Registrar's Office is void and not binding on the Bank. The appellant/petitioner has no right over the petition schedule property. The property has been sold and purchased by the 1st respondent fully in compliance with the procedure as established by law. Petitioner has no right whatsoever over the property in question and the application is liable to be dismissed. It was also contended that the petitioner and his mother, the judgment debtor in E.P.No.5/97, did not prefer any appeal against the order passed by this Court in the C.R.P. and the objection now raised cannot be accepted.

2. The application now filed was disposed of earlier, against which Execution First Appeal No.23/2004 was filed before this Court and the order was set aside by this court and remanded the application for consideration on merits. Appellant/petitioner was examined as PW-1 and Exts.P1 to P4 were marked in the case. On the side of the 1st respondent/auction purchaser, he gave evidence as RW-1 and Exts. B1 to B3 were marked. There was no evidence either oral or documentary adduced on the side of the other respondents.

3. The court below after consideration of the rival submissions

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between the parties, found that the appellant/petitioner has not established any independent right over the property and accordingly, the application was dismissed, against which the present appeal is filed.

4. It is an admitted fact that the 2nd respondent Bank had instituted the suit O.S.No.391/84 for realisation of the amount due to them. Chandrika N. Menon, the mother of the appellant herein was the defendant in the said suit, which was eventually decreed in favour of the Bank and the proceedings became final. It was thereafter that E.P.No.5/97 was filed. Chandrika N. Menon herself had raised certain objections at the execution stage disputing the upset price of the property, which was also incorporated with the proclamation of sale and the property was put for sale on 26/7/1999 and purchased by the 1st respondent for an amount of Rs.7 lakhs. Thereafter, Chandrika N. Menon, the judgment debtor in E.P.No.5/97 filed E.A.No.1137/99 under Order XXI Rule 90 of the C.P.C. seeking to set aside the sale, which was dismissed on 10/3/2000 against which C.R.P.No.1438/2000 was preferred. That was also dismissed on 8/10/2001. The auction purchaser deposited the sale proceeds and sale sannad was issued to the 1st respondent-auction purchaser. Thereafter, he filed an application,

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E.A.No.302/2992 on 6/4/2002 for delivery of the plaint schedule properties. As Chandrika N.Menon died during the pendency of this application, her legal representatives were impleaded as respondents 3 to 6. The 4th additional respondent is the applicant in the delivery application. The point that arises for consideration is as to whether the appellant has any right over the plaint schedule property, as contended by him. In this regard, it is his contention that the property is a thavazhi property belonging to him and the additional respondents 3, 5 and 6 and that the residential building was constructed by late Chandrika N. Menon by utilising the funds of her husband, Parakkotte Narayana Menon, the father of the appellant, and also utilising the funds of the appellant himself. The partition suit O.S.No.170/85 was filed by the appellant and the other members of the family, and a preliminary decree was passed thereon and the partition deed eventually executed between the parties is also relied on in support of the contention that the property is belonging to the appellant. Ext.P3 is the settlement deed executed between Chandrika N. Menon and her children including the appellant. Except the oral testimony of PW-1 that the property is thavazhi property, absolutely no other documentary evidence was let in in support thereof. Being an immovable property, in

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order to show that the property originally belonged to thavazhi, there should have been some documentary evidence to prove the title of the property as thavazhi property. The only deed now produced is Ext.P3 entered into between Chandrika N. Menon and the other members of the family pursuant to the preliminary decree passed in the partition suit between them. Admittedly, the Bank was not a party. Further there is nothing on record to show that Chandrika N. Menon had any such contention in the mortgage suit instituted by the Bank that the said property is a thavazhi property. Further, merely because subsequent to the decree passed in the mortgage suit instituted by the Bank a partition suit filed by the parties will in no way bind the Bank when the Bank was not a party to the suit. This is nothing but a self serving document and in the absence of any prior title to show that the property belonged to the thavazhi property, the settlement deed between the parties pursuant to the partition suit cannot and will not defeat the right of the Bank flowing from the decree obtained by them. It is also pointed out by the learned counsel for the 1st respondent that the partition suit itself was not seriously contested and soon after the preliminary decree they had entered into a partition deed and registered the same so as to defeat the right of the

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Bank. Admittedly, the appellant returned from abroad in the year 2000. Chandrika N. Menon is none other than his mother. Chandrika N. Menon had though fought litigation even at the execution stage and it is improbable to believe that the appellant was not aware of the proceedings. The contention of Chandrika N. Menon itself in the execution stage was found against. Though the appellant had contended that the properties were purchased with the funds generated by sale of the property belonging to the father of the appellant, the husband of Chandrika N. Menon, there is no material on record to support this plea. There is also absolutely no evidence adduced to prove that the appellant has contributed any funds for the construction of the building in the property. Except the oral testimony of PW-1 no other evidence was adduced in the case in support of the plea now raised. The appellant had no case that Chandrika N. Menon, his mother had created an equitable mortgage of the property with the Bank to defeat any of his right or that the mother had any ill will or motive against the appellant. Chandrika N. Menon had also no case that any other person had any right over the property. The appellant has no case that any document to prove that the property is originally belonged to thavazhi was produced in the partition suit. The plea as raised in the suit

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in the absence of any contest did not require any adjudication and the preliminary decree passed cannot take away the right of the Bank flown from the decree in their favour. Admittedly, the Bank was not even made as a party in that suit. No notice whatsoever has been issued to the Bank regarding the partition suit. The finding of the court below in such circumstances that the partition suit itself was filed by the appellant colluding with his mother cannot be found to be wrong. As already pointed out RW-1 himself has admitted in the box that Chandrika N. Menon had not taken any stand and contended that the petition schedule property is the joint property and was purchased by the sale proceeds of the thavazhi property in O.S.No.391/84. The appellant's brother (6th respondent in the present petition) was the defendant in O.S.No.391/84. He also did not have any such contention even in the execution petition. In the application filed under Order XXI Rule 90 of the C.P.C. Chandrika N. Menon also had no case that the petition schedule property was a common property of the thavazhi. In C.R.P.No.1438/2000 filed before this Court also no such contention was raised. The application under Order XXI Rule 90 of the C.P.C. having been dismissed and confirmed by this Court, the present contention of the appellant has only to be rejected

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in the absence of any independent evidence to prove that the property originally belonged to thavazhi. The property undisputably stands in the name of Chandrika N. Menon. Nothing is produced to show that the funds generated for the purpose of purchase of the property by Chandrika N. Menon were from her husband or from the appellant. On a totality of the facts and circumstances namely that the property was an out right purchase by Chandrika N. Menon in her own name, she herself having mortgaged the property to the Bank and having acted upon by the Bank and eventually obtaining a decree against Chandrika N. Menon and not raising any contention in the suit that the property belonged to thavazhi and the absence of such a plea raised in the application under Order XXI Rule 90 of the C.P.C. filed by her or by the brother of the appellant all will go to show that the present contention raised by the appellant is without any substance and untenable. The court below has considered the matter elaborately, after referring to the entire facts and circumstances and the previous litigation between the parties and the conclusion reached by the court below that the appellant has not established his right over the property cannot be assailed and the finding by the court below is not shown to be in any way wrong. We do not find any reason to disagree

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with the finding as entered by the court below.

5. The learned counsel for the appellant placed reliance on Section 64 of the Cochin Nayar Act and contended that unless a contrary intention appears from the conduct of parties, the property shall be taken as thavazhi property. As per Section 64 of the Cochin Nayar Act, where a person bequests or makes a gift of any property to or purchases any property in the name of his wife alone or his wife and one or more of his children by such wife together, such property shall unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as thavazhi property by the wife, her sons and daughters. In this case admittedly the property in question was purchased by Chandrika N.Menon and as already indicated, there is absolutely no evidence to show that the property was purchased by her husband in her name. In the absence of any evidence to show that the funds for the purchase of property came from the hands of her husband, no contention as such could validly be raised under Section 64 of the Cochin Nayar Act. Necessary facts are not established by cogent evidence that the purchase of the property by Chandrika N. Menon was either with the funds provided by her husband or by sale of any thavazhi property, if

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any. Thus there cannot be any presumption that the purchase made by Chandrika Menon from a third party for valid consideration could be treated as a thavazhi property.

In the result, we find no merit in this appeal. Accordingly, it is dismissed.

**P . R . RAMAN ,  
Judge .**

**ANTONY DOMINIC ,  
Judge .**

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